PP

v.

ABDUL JALIL ISMAIL

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CRIMINAL APPEAL NO: B-05-68-1997]
31 OCTOBER 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - End of prosecution - Whether prima facie case made out - Whether trial judge made fundamental error of law in reducing charge - Whether trial judge merely expressing finding of fact as to possession of dangerous drug*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Chemist report - Chemist stated no difference between "cannabis" and "Indian hemp" - Two basic penalties in Dangerous Drugs Act 1952 for one offence involving same substance - Whether increased penalty applicable in this case - Whether presumption of trafficking under s. 37(da) of Dangerous Drugs Act 1952 arose - Whether trial judge had erred - Whether decision in Shukri Mohamad v. PP distinguishable*

The respondent was tried on a charge of trafficking in 1,833.92 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable with death under s. 39B(2) of the Act. At the close of the prosecution, the trial judge amended the charge to one of possession of cannabis under s. 12(2) of the Act, whereupon the respondent pleaded guilty to the charge and was sentenced to four years' imprisonment under s. 12(3) of the Act. The Public Prosecutor appealed against the amendment of the charge and sentence, and requested that this court set aside the decision of the trial judge and call upon the respondent to enter his defence to the original charge of trafficking under s. 39B(1)(a) of the Act.

The Deputy Public Prosecutor submitted that the trial judge had erred in law when, after finding that the prosecution had proved the case beyond reasonable doubt, he amended the charge to one under s. 12(2) of the Act. The main ground of this appeal, however, concerned the testimony of the chemist, who had testified that the substance in question was cannabis as defined in s. 2 of

the Act. He also said that cannabis and cannabis (Indian hemp) were the same and that there was no difference between them. The unauthorised possession of cannabis is punishable under s. 6 of the Act whereas unauthorised possession of cannabis (Indian hemp) – included under Part III of the First Schedule to the Act – was punishable under s. 12(3) of the Act. The trial judge ruled that since cannabis and cannabis (Indian hemp) were the same, a doubt existed as to the appropriate punishment as it was open to two constructions, and in this case, the lesser of the two offences should be followed because the benefit of the doubt should be given to the respondent.

Held:
Abdul Aziz Mohamad JCA

[1] The trial judge could not have made so fundamental an error as to find that the prosecution had made out a *prima facie* case of an offence under s. 39B(1)(a) of the Act, and then to proceed to reduce the charge. What the trial judge meant when he said that the prosecution had made out a *prima facie* case on the offence charged was simply that he found that the prosecution had made out a *prima facie* case of possession of the dangerous drug. He was expressing a finding of fact as to possession. (p 757 e-f)

[2] The question of giving the respondent the benefit of the lighter penalty would have arisen only in respect of the basic penalty because the Act provided for two basic penalties for the same offence involving the same substance, according to whether it was to be called cannabis or Indian hemp. However, when it comes to an increased penalty, there would be no doubt that since the substance was cannabis, the increased penalty in respect of cannabis would apply. The absence of doubt becomes starkly clear when the case is one of possession of 200 grams or more in weight of the substance, as in the present case, because then the presumption of a different offence arises under s. 37(da) of the Act, namely the presumption of trafficking in the substance. This substance was cannabis, and although it was known as Indian hemp – which is not included in s. 37(da) of the Act – the presumption arose because cannabis was included in s. 37(da) of the Act. The fact that it was also known as Indian hemp was not relevant to the question of the application of s. 37(da) of the Act, as it would have been relevant to the question of the appropriate basic penalty for unauthorised possession. Therefore, the trial judge had erred in his reasoning for reducing the charge in this case. (p 760 h)

[2a] As the Supreme Court case of *Shukri Mohamad v. PP* was decided on the premise that "cannabis" as defined in s. 2 of the Act and "cannabis (Indian hemp)" in Part III of the First Schedule to the Act could be different substances, it could not be applied to the present case because there was evidence, elicited by counsel for the respondent himself, that cannabis and cannabis (Indian hemp) were only two names for the same substance. (p 762 e)

[Appeal allowed; conviction and sentence set aside and respondent to be called upon to enter defence on original charge under s. 39B(1)(a) of the Act.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden didakwa atas pertuduhan mengedar 1,833.92 gram kanabis, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') yang boleh dihukum dengan hukuman mati di bawah s. 39B(2) Akta. Di akhir kes pendakwaan, hakim bicara telah meminda pertuduhan kepada pertuduhan memiliki kanabis di bawah s. 12(2) Akta, berikutan mana responden mengaku bersalah dan dihukum empat tahun penjara di bawah s. 12(3) Akta. Pendakwa Raya merayu terhadap pemindaan pertuduhan dan hukuman, sekaligus memohon mahkamah ini mengetepikan keputusan hakim bicara dan memanggil responden untuk membela diri terhadap pertuduhan asal mengedar di bawah s. 39B(1)(a) Akta.

Timbalan Pendakwa Raya berhujah bahawa hakim bicara telah khilaf di sisi undang-undang bilamana, setelah mendapati pendakwaan telah membuktikan kes tanpa keraguan munasabah, beliau meminda pertuduhan kepada pertuduhan di bawah s. 12(2) Akta. Alasan penting rayuan di sini, bagaimanapun, adalah terhadap testimoni ahli kimia, yang memberi keterangan bahawa dadah berkenaan adalah kanabis sepertimana ianya ditafsir di dalam s. 2 Akta. Ahli kimia juga menyatakan bahawa kanabis dan kanabis (Indian hemp) adalah sama dan bahawa tiada apa-apa perbezaan di antara keduanya. Pemilikan kanabis tanpa izin adalah boleh dihukum di bawah s. 6 Akta sementara pemilikan kanabis (Indian hemp) tanpa izin – yang terangkum dalam Bahagian III Jadual Pertama Akta – adalah boleh dihukum di bawah s. 12(3) Akta. Hakim bicara memutuskan bahawa oleh kerana kanabis dan kanabis (Indian hemp) adalah sama, maka timbul keraguan mengenai hukuman yang sesuai memandangkan ianya terbuka kepada dua interpretasi, dan dalam kes semasa, kesalahan yang lebih ringan dari dua kesalahan tersebut hendaklah diikuti kerana manfaaat keraguan harus diberikan kepada responden.

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Hakim bicara tidak mungkin telah melakukan kekhilafan yang sebegitu fundamental sehinggakan setelah mendapati bahawa pendakwaan telah membuktikan satu kes *prima facie* di bawah s. 39B(1)(a) Akta, beliau kemudian mengambil langkah untuk menurunkan pertuduhan. Apa yang dimaksudkan oleh hakim bicara apabila beliau mengatakan bahawa pendakwaan telah membuktikan kes *prima facie* terhadap kesalahan seperti dalam pertuduhan hanyalah bahawa beliau mendapati pendakwaan telah membuktikan suatu kes *prima facie* pemilikan dadah berbahaya. Beliau hanya menyampaikan dapatan faktanya mengenai pemilikan.

[2] Soal memberikan responden manfaat hukuman lebih ringan hanya berbangkit berkaitan hukuman asas oleh kerana Akta telah memperuntukkan dua hukuman asas bagi kesalahan yang sama yang melibatkan dadah berbahaya yang sama, mengikut sama ada ianya digelar kanabis ataupun Indian hemp. Bagaimanapun, berhubung hukuman lebih berat, ianya jelas bahawa oleh kerana dadah berbahaya itu adalah kanabis, hukuman lebih berat berkaitan kanabis harus dilaksanakan. Ketiadaan syak akan bertambah mantap apabila kes berkenaan adalah kes pemilikan 200 gram atau lebih dadah berbahaya tersebut, sepertimana yang di dalam Akta, iaitu andaian pengedaran bahan tersebut. Bahan ini adalah kanabis, dan walaupun ianya dikenali sebagai Indian hemp - yang tidak dirangkumi s. 37(da) Akta – andaian telah berbangkit kerana kanabis telah dirangkumi oleh s. 37(da) Akta. Fakta bahawa ianya juga adalah dikenali sebagai Indian hemp adalah tidak relevan kepada persoalan pemakaian s. 37(da) Akta, meskipun ianya relevan kepada persoalan hukuman asas yang sesuai bagi pemilikan yang tidak diizinkan. Oleh itu, hakim bicara telah khilaf dalam alasan-alasannya ketika menurunkan pertuduhan dalam kes ini.

[2a] Oleh kerana Mahkamah Agong dalam kes *Shukri Mohamad lwn. PP* telah diputuskan di atas dasar bahawa "kanabis" seperti yang ditakrif di dalam s. 2 Akta dan "kanabis (Indian hemp)" di dalam Bahagian III kepada Jadual Pertama Akta mungkin merupakan bahan yang berbeza, ianya tidak boleh dipakai kepada kes semasa kerana terdapat keterangan, yang diutarakan oleh peguam responden sendiri, bahawa kanabis dan kanabis (Indian hemp) hanyalah dua nama bagi bahan yang serupa.

Rayuan dibenarkan; sabitan dan hukuman diketepikan; responden hendaklah dipanggil membela diri terhadap pertuduhan asal di bawah s. 39B(1)(a) Akta.]

Case(s) referred to:
Mohd Yusof Said v. PP [1996] 2 CLJ 13 FC ***(refd)***
PP v. Mohammad Khalafi (High Court Shah Alam, Criminal Trial No: 47-12-95) (Unreported) ***(refd)***
Shukri Mohamad v. PP [1995] 3 CLJ 799 SC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 11(1), 12(2), (3), 37(da)(vi), 39A(1), (2), 39B(1)(a), (2)
Federal Constitution, art. 8(1)

For the appellant - Abdul Wahab Mohamad DPP
For the respondent - Karpal Singh; M/s Karpal Singh & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad JCA:
The respondent was tried in the High Court on a charge of trafficking in 1,833.92 grammes of cannabis on 9 February 1996 at 2.20am in a room of a house in Kampung Pandan, Ampang, in the State of Selangor. The offence was under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and was punishable with death under s. 39B(2) of the Act. After hearing the submission of Encik Karpal Singh, the respondent's counsel, at the close of the case for the prosecution, the trial judge amended the charge to one of possession of 1,833.92 grammes of cannabis under s. 12(2) of the Act, whereupon the respondent pleaded guilty to the charge and the judge sentenced him to four years' imprisonment under s. 12(3). The Public Prosecutor appeals to this court against the amendment of the charge and against the sentence. He asks this court to set aside the decision of the trial judge and call upon the respondent to enter upon his defence to the original charge of trafficking under s. 39B(1)(a).

We shall first dispose of a minor issue that was submitted on by the learned Deputy Public Prosecutor in this appeal and which we believe is rooted in ground 4 in the petition of appeal. That ground says that the trial judge erred in law when, after finding that the prosecution had proved the case beyond reasonable doubt, he amended the charge to one under s. 12(2). The assertion as to what the judge did is based on the judge's grounds of decision, and not on the judge's notes of proceedings, which do not show that the judge did as asserted. They show that after submissions at the close of the case for the prosecution the judge postponed his decision to another date, and on that date the first thing that he did was to announce the amendment of the charge. In his grounds of decision, however, the judge, after stating the facts of the case

and explaining what is meant by a *prima facie* case, said at p. 3, "In the instant case I found that a *prima facie* case has been made out against the accused on the offence charged". He then proceeded to consider the sole point raised by Encik Karpal Singh and concluded at p. 6 as follows:

> Weighing all the evidence before me, I come to the conclusion that in the instant case section 37 of DDA is not applicable to the charge. As stated earlier I have found the prosecution has established the charge against the accused beyond all reasonable doubt. For that reason I conclude that it would be proper that the accused be charged for the lesser offence for possession of cannabis under section 12(2) of the DDA 1952.

It is to be observed that in that passage he again said in effect that he found a *prima facie* case had been made out on the charge.

Encik Karpal Singh suggested to us that in the first quoted statement above, the word "not" had inadvertently been left out and that the relevant words should read "a *prima facie* case has not been made out". But that would still leave the judge saying in the second quote to the effect that a *prima facie* case had been made out on the charge. The word "not" could not have been inadvertently left out twice.

We are of the view that the judge could not have made so fundamental an error as to have found the prosecution had made out a *prima facie* case of an offence under s. 39B(1)(a) and then to have proceeded to reduce the charge, and that what actually happened was as recorded in the notes of proceedings. We think what the judge meant in his grounds of decision when he said that the prosecution had made out a *prima facie* case on the offence charged was simply that he found that the prosecution had made out a *prima facie* case of possession of the dangerous drug. He was expressing a finding of fact as to possession. We do not think there is any merit in ground 4.

We turn now to consider the main ground of this appeal, which questions the justification for the reduction of the charge.

In his submission at the close of the case for the prosecution, Encik Karpal Singh raised only one issue, and it was an issue of law that arose out of the testimony of the chemist who analysed the substance that was the subject matter of the charge. That means that no question arose in the trial as to the respondent being in possession of the substance. Neither has such a question arisen in this appeal. Therefore we do not propose to set out the facts from which the trial judge found that the prosecution had proved possession. The question of possession is relevant to the charge of trafficking in this case

because according to s. 37(da)(vi) of the Act a person who is found in possession of 200 grammes or more in weight of cannabis shall be presumed, until the contrary is proved, to be trafficking in it.

Before setting out the testimony of the chemist that gave rise to the issue, and dealing with the issue, it is appropriate that we set out the provisions of the Act that are relevant to the issue.

Section 2 of the Act defines "dangerous drug" as any drug or substance in the First Schedule to the Act, which comprises four Parts. "Cannabis" is included in Part I and Part II. Therefore cannabis is a dangerous drug. Section 2 further provides a definition of "cannabis". Unauthorized possession of cannabis is an offence under s. 6 for which the basic penalty is a fine of not exceeding twenty thousand ringgit or imprisonment for a term not exceeding five years or both. We say "basic penalty" because s. 39A provides for increased penalties depending on the amount of cannabis involved. Unauthorized possession of a dangerous drug is also an offence under s. 12(2), for which the basic penalty under s. 12(3) at the date of offence in this case, namely 9 February 1996, was the same as the penalty under s. 6. Section 12(2), however, according to s. 11(1), applies to dangerous drugs listed in Parts III, IV and V of the First Schedule, and in those Parts there is no mention of "Cannabis" by itself but there was, at the date of offence in this case, in Part III the inclusion of "Cannabis (Indian Hemp)". That item was subsequently removed from the First Schedule by an order made on 3 April 1996 and gazetted under P.U.(A) 170 of 1996. The increased penalties prescribed by s. 39A also apply to the offence under s. 12(2) of possession of a dangerous drug in Part III, IV or V of the First Schedule if the drug is specified in s. 39A. Section 39A does not specify "cannabis (Indian hemp)" but does specify "cannabis".

If a person is found in possession of a particular amount or more of a particular dangerous drug, being an amount and a drug specified in s. 37(da), it will no longer be a case of increased penalty for the offence of possession of the dangerous drug, because in that case s. 37(da) provides that the offender shall be presumed, until the contrary is proved, to be trafficking in the drug, which is a separate offence under s. 39B(1)(a) punishable with death. Section 37(da) does not specify "cannabis (Indian hemp)" but does specify "cannabis". For cannabis, as we said, the amount specified by s. 37(da)(vi) is 200 grammes or more in weight.

The chemist in this case had testified in examination-in-chief that the plant material that he examined was cannabis as defined in s. 2 of the Act. In cross-examination by Encik Karpal Singh, he had testified that cannabis and Indian hemp or cannabis (Indian hemp) were the same and that there was no difference between them. In re-examination he had confirmed that cannabis and Indian hemp or cannabis (Indian hemp) were different names for the same thing.

After the close of the case for the prosecution, as the only issue that he had to raise, Encik Karpal Singh urged the trial judge, in view of the chemist's evidence that cannabis and Indian hemp or cannabis (Indian hemp) were the same thing, to follow his decision in *Pendakwa Raya v. Mohammad Khalafi* (Mahkamah Tinggi Shah Alam Perbicaraan Jenayah No. 47-12-95) (unreported), and reduce the charge to one of possession under s. 12(2). The trial judge acceded to Encik Karpal Singh's entreaty.

In his grounds of decision, at p. 4, referring to the evidence of the chemist, the judge said, "In gist what he was saying was the fact that the dangerous drugs in the DDA were all the same", and therefore concluded, reiterating what he had said in *Mohammad Khalafi*: "It follows that if they were all the same then the provisions for different punishments are, I think is *(sic)* illogical and amount to a violation of art. 8(1) of the Federal Constitution". A little later, he said at p. 5, reiterating what he had said in *Mohammad Khalafi*, that since cannabis and cannabis (Indian hemp) were the same, "a doubt exists here as to their punishments because it was open to two constructions and in this case the lesser of the two offences should be followed because the benefit of the doubt should be given to the accused".

Laying aside his statement that according to the chemist the dangerous drugs in the Act were all the same, which obviously is not correct, we think what moved the judge to reduce the charge was his perception that for the same act involving the substance that was the subject matter of the offence in this case, the Act created two offences. In order to give clarity to an evaluation of the soundness of that perception, we shall treat the item "Cannabis (Indian Hemp)" in Part III of the First Schedule to the Act as simply "Indian hemp". The judge perceived that for the same act involving the substance in this case the Act created two offences, according as to whether the substance was taken, for the purposes of the Act, as going by the name "cannabis" or the name "Indian hemp".

That perception, we think, would be true only to a certain extent. If the respondent had been in possession of, say, 15 grammes of the substance in this case, taking it as going by the name of "cannabis" he would have committed the offence of unauthorized possession of cannabis under s. 6 and

punishable under that section, because that section covers cannabis; but taking the substance as going by the name of "Indian hemp", he would have committed an offence of unauthorized possession of Indian hemp under s. 12(2) and punishable under s. 12(3), because s. 12 applies to a dangerous drug listed in Part III, IV or V of the First Schedule and Indian hemp was included in Part III. It would have been a situation where, because the same substance is known by two names, the respondent could be liable to be punished for unauthorised possession of it under either s. 6 or s. 12(3). As the penalties then stood, the choice of the section under which to charge him would not have been a problem, because the penalties under the two sections were equal. But supposing the penalties had been different, as they are now, when the fine under s. 12(3) is one hundred thousand ringgit as compared with twenty thousand ringgit under s. 6, doubt as to the section under which to punish the respondent would have arisen. It would not be fair to place him under the risk of incurring the higher penalty under s. 12(3) by taking the substance as going by the name of Indian hemp, since if it were taken as going by the name of cannabis the penalty for the same offence under s. 6 would be lower. So if the respondent had been charged for unauthorised possession of Indian hemp under s. 12(3), the court would be justified, if it was minded to impose only a fine, and giving the benefit of the doubt to the respondent, to reduce or amend the charge to one of possession of cannabis under s. 6. The situation would have resolved into a problem arising from the existence of two different basic penalties for the same offence. It would have had nothing to do, as the trial judge thought, with any question of equality of persons before the law that art. 8 of the Federal Constitution guarantees.

But if the amount of the substance had been, say, 40 grammes or 80 grammes, the respondent would have been liable to the increased penalty under s. 39A(1) or 39A(2), as the case may be, for possession of cannabis irrespective of the fact that it was also known as Indian hemp. He would not have been able to insist that the case be brought on the basis that the substance should be taken as going by the name "Indian hemp", that therefore he be charged for unauthorised possession of Indian hemp under s. 12, and that the increased penalties under s. 39A be not applied to him as s. 39A does not mention Indian hemp. That is because the inescapable fact and truth was that the substance, although known also as Indian hemp, was cannabis, and cannabis is included in s. 39A. The question of giving the respondent the benefit of the lighter penalty would have arisen only in respect of the basic penalty because the Act provided for two basic penalties for the same offence involving the same substance according as to whether it was to be called cannabis or Indian hemp. But when it comes to an increased penalty there would be no doubt that, the substance being cannabis, the increased penalty in respect of cannabis would apply.

The absence of doubt becomes starkly clear when the case is one of possession of 200 grammes or more in weight of the substance, as is actually the present case, because then the presumption of a different offence arises under s. 37(da), namely the presumption of trafficking in the substance. The substance being cannabis, the presumption arises, even though it is also known as Indian hemp and Indian hemp is not included in s. 37(da). The substance being cannabis, and cannabis being included in the section, the fact that it is also known as Indian hemp is not relevant to the question of the application of s. 37(da), as it would have been relevant to the question of the appropriate basic penalty for unauthorised possession.

In our opinion, therefore, the trial judge was in error in his reasons for reducing the charge in this case.

In submission in this appeal, Encik Karpal Singh, in supporting the trial judge's reasoning, said that it was on the same lines as the reasoning in *Shukri bin Mohamad v. Public Prosecutor* [1995] 3 CLJ 799, an authority which was not cited by the judge in his grounds of decision in this case and in the previous case of *Mohammad Khalafi*, and which therefore did not operate on his mind in arriving at his decisions in the two cases. The reasoning in *Shukri* was, in fact, entirely different, and it was so because the decision in *Shukri* arose from a premise that was diametrically opposed to the evidence in this case, where the evidence is that cannabis is the same substance as Indian hemp.

In *Shukri*, the accused was convicted of trafficking in 36 kilogrammes of cannabis and was sentenced to death. He appealed to the Supreme Court, and took up only one ground, which arose from the fact that at that time, as at the time in the present case, the Act had in s. 2 a definition for "cannabis" and also, in Part III of the First Schedule, the item "Cannabis (Indian Hemp)". It was argued that the evidence of the chemist had created a doubt as to whether the substance he analysed was "cannabis" as defined in s. 2 or was the "Cannabis (Indian Hemp)" that was listed in Part III of the First Schedule. The Supreme Court found certain infirmities in the testimony of the chemist. It is not necessary for the purpose in hand to state what those infirmities were. We need only say that subsequently, the Federal Court, when considering *Shukri* in *Mohd. Yusof bin Said v. Public Prosecutor* [1996] 2 CLJ 13, gave a summary of the infirmities at p. 21 a-d, saying that there were two infirmities.

Having noted the infirmities, the Supreme Court in *Shukri* said at p. 804:

> Having regard to the infirmities in the testimony of the chemist to which we have adverted, his testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s. 2 of the Act or that it was 'cannabis (Indian Hemp)' listed in Pt III of the First Schedule of the Act, though nowhere defined in the Act.

Further on, at p. 805, the Supreme Court said:

> We need hardly add, that if, as we find, that in the context of the relevant legislation 'cannabis' or 'cannabis (Indian Hemp)' even though of the same weight may not be the same thing, in the sense that they may constitute the subject matter of different offences which may be differently penalised, then the presumption of trafficking under s. 37(da) of the Act cannot arise, in the present case, ...

It is to be observed that the premise on which the Supreme Court proceeded was that "cannabis" as defined in s. 2 and "Cannabis (Indian Hemp)" in Part III of the First Schedule might not be the same thing. If "Cannabis (Indian Hemp)" was a different substance from "cannabis", then the presumption under s. 37(da) could not arise in respect of the plant material in the case because "Cannabis (Indian Hemp)" was not included in the section and neither could it be said that the plant material was "cannabis", which was so included, because it might be a different substance, "Cannabis (Indian Hemp)". That was the reason why the Supreme Court in that case quashed the death sentence and substituted for it a sentence under s. 12(3) for an offence under s. 12(2). We suppose it was for the same reason that s. 37A was not applied to impose an increased penalty. *Shukri* was so decided on the premise that "cannabis" as defined in s. 2 and "Cannabis (Indian Hemp)" in Part III of the First Schedule could be different substances. The decision in *Shukri* cannot be applied to the present case because there is evidence, elicited by counsel for the respondent himself, that "cannabis" and "Cannabis (Indian Hemp)" are only two names for the same substance.

As we said, we are of opinion that the trial judge erred in reducing the charge. Therefore we allow this appeal of the Public Prosecutor, set aside the conviction and sentence, and order that the respondent be called upon to enter upon his defence on the original charge under s. 39B(1)(a).